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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JEFFREY CHEN,

Plaintiff,

v.

CHASE BANK USA, N.A., and DOES 1-
100,

Defendants.

Case No. 3:19-cv-01082-JSC

**PLAINTIFF'S MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: June 25, 2020

Time: 9:00 AM

Judge: Hon. Jacqueline Scott Corley

Courtroom: E-15th Floor

TABLE OF CONTENTS

1. Introduction	6
2. Background	6
3. Class Notice and Claims Administration.....	7
A. CAFA Notice	7
B. Implementation of the Notice Plan	7
C. Claims and Requests for Exclusion.....	8
D. Administration Costs.....	9
E. Payments	9
F. Post-Distribution Accounting	11
4. Argument.....	11
A. Legal Standard	11
B. Final Class Certification.....	11
(1) Rule 23(a) Requirements	12
(2) Rule 23(b) Requirements	12
(3) Rule 23(c)(2) Notice Requirements	13
C. Approval of the Settlement	14
(1) The Settlement satisfies the Churchill factors.	15
(a) Strength of Plaintiff's Case and the Risk, Expense, Complexity, and Likely Duration of Further Litigation.....	15
(b) Risks of Maintaining Class Action Status Throughout Trial	16
(c) The Settlement Amount	17
(d) Extent of Discovery.....	18
(e) Experience and Views of Counsel	18
(f) Presence of a Government Participant	19
(g) Reaction of Settlement Class Members	19
(2) The Settlement satisfies the Bluetooth factors.....	20
5. Conclusion	22

TABLE OF AUTHORITIES

Cases

<i>Anderson v. United Fin. Co.</i> , 666 F.2d 1274 (9th Cir. 1982)	15
<i>Bayat v. Bank of the W.</i> , No. C-13-2376 EMC, 2015 WL 1744342 (N.D. Cal. Apr. 15, 2015)....	17
<i>Churchill Village, L.L.C. v. General Electric</i> , 361 F.3d 566 (9th Cir. 2004)	14, 15
<i>Couser v. Comenity Bank</i> , 125 F. Supp. 3d 1034 (S.D. Cal. 2015)	20
<i>Dashnaw v. New Balance Athletics, Inc.</i> , No. 17cv159-L(JLB) 2019 WL 3413444 (S.D. Cal. Jul. 29, 2019).....	22
<i>Diaz v. Trust Territory of Pac. Islands</i> , 876 F.2d 1401, 1408 (9th Cir. 1989)	11
<i>Garner v. State Farm Mut. Auto. Ins. Co.</i> , No. CV 08 1365 CW (EMC), 2010 WL 1687832 (N.D. Cal. Apr. 22, 2010)	20
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998).....	12, 19
<i>In re Anthem, Inc. Data Breach Litig.</i> , 327 F.R.D. 299 (N.D. Cal. 2018).....	17
<i>In re Bluetooth Headset Prods. Liab. Litig.</i> , 654 F.3d 935 (9th Cir. 2011).....	14, 20, 21, 22
<i>In re Volkswagen “Clean Diesel” Mktg., Sales Practices, and Prods. Liab. Litig.</i> , 895 F.3d 597 (9th Cir. 2018).....	22
<i>Linney v. Cellular Alaska P’ship</i> , 151 F.3d 1234 (9th Cir. 1998).....	18
<i>Messineo v. Ocwen Loan Servicing, LLC</i> , No. 15-cv-02076-BLF, 2017 WL 733219 (N.D. Cal. Feb. 24, 2017).....	20
<i>Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> , 221 F.R.D. 523 (C.D. Cal. 2004).....	11, 17
<i>Ontiveros v. Zamora</i> , 303 F.R.D. 356, 363 (E.D. Cal. 2014)	11, 18
<i>Ravens v. Iftikar</i> , 174 F.R.D. 651 (N.D. Cal. 1997).....	13
<i>Relente v. Viator, Inc.</i> , No. 12-cv-05868-JD, 2015 WL 3613713 (N.D. Cal. June 9, 2015)	21
<i>Rodriguez v. W. Publ’g Corp.</i> , 563 F.3d 948 (9th Cir. 2009)	15
<i>Safeco Ins. Co. of Am. v. Burr</i> , 551 U.S. 47 (2007)	16
<i>Satchell v. Fed. Exp. Corp.</i> , No. C 03-2659 SI, 2007 WL 1114010 (N.D. Cal. Apr. 13, 2007)....	22
<i>Schuchardt v. Law Office of Rory W. Clark</i> , 2016 U.S. Dist. LEXIS 6741 (N.D. Cal. Jan. 20, 2016)	21
<i>Schuchardt v. Law Office of Rory W. Clark</i> , 314 F.R.D. 673 (N.D. Cal. 2016)	22
<i>Shvager v. ViaSat, Inc.</i> , No. 12-10180 MMM (PJWx), 2014 WL 12585790 (C.D. Cal. Mar. 10, 2014)	20, 22

1	<i>Silber v. Mabon</i> , 18 F.3d 1449 (9th Cir. 1994).....	13
2	<i>Staton v. Boeing Co.</i> , 327 F.3d 938, 952 (9th Cir. 2003).....	11
3	<i>Uschold v. NSMG Shared Services, LLC</i> , No. CV 18-01039 JSC, 2019 WL 4963261 (N.D. Cal. Oct. 8, 2019).....	11

Statutes

5	15 U.S.C. § 1691	15, 16, 17
6	15 U.S.C. § 1691e	15, 16, 17
7	28 U.S.C. § 1715	7, 19
8	Fed. R. Civ. P. 23	passim

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on June 25, 2020, at 9:00 AM, before the Hon. Jacqueline Scott Corley, in Courtroom E, 15th Floor of the San Francisco Courthouse of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, Plaintiff Jeffrey Chen will and hereby does move the pursuant to Federal Rule of Civil Procedure 23(e) for an order: (1) granting final approval of the Settlement, (2) granting final certification of the Settlement Class for settlement purposes only, (3) entering final judgment, and (4) granting any other and further relief that the Court deems just and proper.

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities below, the Joint Declaration of Plaintiff's Counsel and the Declaration of Jeanne Chernila (of KCC Class Action Services, LLC, Settlement Administrator) filed herewith, the record in this case, and any additional argument or evidence the Court may consider.

DATED: May 21, 2020

RESPECTFULLY SUBMITTED,

**GALLO LLP
DARR LAW LLC
VALERIAN LAW, P.C.**

By: /s/ Dominic Valerian
Dominic Valerian
Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

1. Introduction

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiff Jeffrey Chen requests final approval of the Settlement he has reached with Defendant Chase Bank USA, N.A. now known as JPMorgan Chase Bank, N.A. (“Chase”) to resolve this lawsuit.¹ On January 16, 2020, the Court granted preliminarily approval of the proposed Settlement, provisionally certified the Settlement Class for settlement purposes, directed notice to the class, and scheduled a final approval hearing for June 25, 2020. (Dkt. No. 52.) Since then, the notice plan approved by the Court has been fully implemented by Kurtzman Carson Consultants LLC (“KCC”), the Settlement Administrator. The proposed Settlement has been well received by the Settlement Class. To date, out of 18,173 Settlement Class Members, 2,963 (16.3%) submitted valid claims, only ten requested exclusion, and none filed objections. As demonstrated herein, the Settlement is fair, reasonable, and adequate and merits final approval by the Court.

2. Background²

Plaintiff filed his Motion for Preliminary Approval on November 22, 2019 and the Court heard the matter on December 12, 2019. (Dkt. Nos. 43, 45.) At the preliminary approval hearing, the Court requested several revisions to the settlement agreement and expressed concern with the cost of settlement administration. Joint Decl. of Pl.’s Counsel in Supp. Pl.’s Mot. for Final Approval (“Joint Decl. re Final Approval”) ¶ 8. On January 13, 2020, based on the Court’s guidance at the preliminary approval hearing, Plaintiff submitted a revised Class Action Settlement Agreement and Release (the “Agreement”) (Dkt. No. 51, Exh. 1), a revised Notice (*id.* at 49), and a summary of an updated administration bid from KCC (Dkt. No. 51 ¶ 9). On January 16, 2020, having considered Plaintiff’s supplemental submission, the Court granted preliminary

¹ Unless otherwise noted, capitalized terms have the meaning ascribed to them in the Class Action Settlement Agreement and Release (Dkt. No. 51, Exh. 1).

² The prior background of this action and the Settlement is detailed in the Preliminary Approval Motion (Dkt. No. 43) and Motion for an Award of Attorneys’ Fees and Costs and Class Representative Incentive Award. (Dkt. No. 53) so it is not repeated here. *See* Northern District’s Guidelines (“If the plaintiffs choose to file two separate motions, they should not repeat the case history and background facts in both motions.”).

approval of the Settlement and scheduled the final approval hearing. (Dkt. No. 52.) On March 24, 2020, Plaintiff filed his Motion for an Award of Attorneys' Fees and Costs and Class Representative Incentive Award seeking attorneys' fees of \$176,473.93, costs of \$8,526.07, and a \$5,000 Class Representative Incentive Award. (Dkt. No. 53.) That motion is noticed for the same date as the final approval hearing. (*Id.*)

3. Class Notice and Claims Administration

A. CAFA Notice

Pursuant to requirements of the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, on November 26, 2019, four days after the Preliminary Approval Motion was filed, KCC caused notices of the proposed settlement containing the materials required by §1715(b) to be mailed to the U.S. Attorney General, the Attorneys General of each of the 50 States and the District of Columbia, the Attorneys General of the 5 recognized U.S. Territories, the Office of the Comptroller of the Currency for the United States, and the Consumer Finance Protection Bureau. Decl. of Jeanne Chernila re: Settlement Administration ("Chernila Decl.") ¶¶ 2-3, Exhs. A, B. On January 17, 2020, soon after the revised Class Action Settlement Agreement and Release was filed, KCC caused amended notices of the proposed Settlement to be mailed to the aforementioned officials. Chernila Decl. ¶¶ 4-5, Exhs. B, C.

B. Implementation of the Notice Plan

KCC has fully implemented the notice plan approved by the Court.

On January 24, 2020, Chase provided KCC with a Class List of 18,183 persons containing names, addresses, and email addresses. Chernila Decl. ¶ 7. KCC removed duplicate records and processed the names and addresses through the National Change of Address Database resulting in 2,903 updated addresses and a list of 18,173 unique individuals. *Id.*

On February 28, 2020, KCC caused the Notice to be emailed to the 17,926 Settlement Class Members for whom Chase provided an email address. Chernila Decl. ¶ 8. A copy of the e-mail Notice sent to the Class is attached as Exhibit D to the Chernila Declaration. *Id.* The same day, KCC caused the Notice and Claim Form (the "Notice Packet") to be mailed to the 247 Settlement Class Members without an email address. Chernila Decl. ¶ 9. A copy of the Notice

1 Packet is attached as Exhibit E to the Chernila Declaration. *Id.*

2 1,557 Settlement Class Members' email notifications were deemed undeliverable or
3 "bounced." Chernila Decl. ¶ 10. KCC caused the Notice Packet to be mailed to these Settlement
4 Class Members on March 6, 2020. *Id.* 13,557 e-mail notifications were deemed delivered but not
5 opened by Settlement Class Members within 7 days of receipt. *Id.* ¶ 11. On March 10, 2020, KCC
6 caused the Notice Packet to be mailed to the 13,557 Settlement Class Members who did not open
7 their e-mail notifications within 7 days. *Id.*

8 KCC received 191 Notice Packets returned by the USPS with complete forwarding
9 addresses and promptly caused them to be re-mailed to the forwarding address. Chernila Decl.
10 ¶ 12. KCC received 1,832 Notice Packets returned by the USPS with undeliverable addresses. *Id.*
11 ¶ 13. KCC found updated addresses for 479 of the Settlement Class Members associated with the
12 undeliverable addresses by searching credit bureau and/or other public source databases and
13 promptly re-mailed Notice Packets to these Settlement Class Members. *Id.* 14 Settlement Class
14 Members were not searched because they had previously contacted KCC and updated their
15 addresses. *Id.*

16 On or about February 27, 2020, KCC established a website—www.ECOASettlement.com
17 —dedicated to this matter to provide information to the Settlement Class Members and to answer
18 frequently asked questions. Chernila Decl. ¶ 14. Visitors of the website could download copies of
19 the Notice, Claim Form, and other case-related documents. *Id.* Plaintiff's Motion for an Award of
20 Attorneys' Fees and Costs and Class Representative Incentive Award was posted to the website
21 on March 24, 2020, the day it was filed. *Id.* Visitors could also submit claims online. *Id.* As of
22 May 6, 2020, the website had received 9,216 visits. *Id.* KCC also established a toll-free telephone
23 number and a dedicated email address for potential Settlement Class Members to obtain
24 information about the Settlement. *Id.* ¶¶ 15-16. KCC received 129 calls to the telephone hotline
25 (88 of which were handled by a live operator) and 37 emails to the dedicated email address (all of
26 which have received replies). *Id.*

27 **C. Claims and Requests for Exclusion**

28 The postmark deadline to submit claims, request exclusion, or file an objection was April

28, 2020. Chernila Decl. ¶¶ 17, 21, 22. Ten Settlement Class Members requested exclusion from the Settlement and no objections have been filed. *Id.* ¶¶ 21, 22. A list of the Settlement Class Members who requested exclusion is attached as Exhibit F to the Chernila Declaration. *Id.* ¶ 21.

To receive a payment, Settlement Class Members were required to “submit a valid Claim Form electronically through the Settlement Website or by mail to the Settlement Administrator” within 60 days after the Notice Date. (Agreement §§ 1.5, 4.3(a), 4.10(b).) The Claim Form was made available on the Settlement Website and included with mailed Notices. Chernila Decl. ¶¶ 9, 14, Exh. E. To date, KCC has received 4,634 timely filed Claim Forms and 21 late Claim Forms. *Id.* ¶ 17. After excluding duplicate Claim Forms and claims submitted by persons who were not on the Class List, KCC determined that there are 2,945 valid timely claims and 18 otherwise valid late claims. *Id.* ¶¶ 18, 19. Pursuant to Section 4.3(d) of the Agreement, which authorizes the parties to determine the validity and timeliness of claims deemed invalid or untimely by the Settlement Administrator, the parties have agreed to accept the 18 otherwise valid late claims. *Id.* ¶ 19. Accordingly, out of 18,173 Settlement Class Members, 2,963 have submitted valid claims to date, which amounts to a 16.3% claims rate.

D. Administration Costs

At preliminary approval, KCC agreed to cap administration costs at \$52,000 contingent upon no significant changes to the scope of work, a class size of 18,183 members, 95% of the class receiving email notification, mailed notification being sent to approximately 7,000 Settlement Class Members, and a claims filing rate of 10%. Joint Decl. re Final Approval ¶ 9. KCC now seeks final settlement administration costs (including taxes) of \$59,242.46. Chernila Decl. ¶ 23. Final administration costs exceed the \$52,000 in administration costs that were projected at preliminary approval primarily because the roughly 16% claims rate is substantially higher than projected, individuals who are not Settlement Class Members filed 1,357 invalid claims, and Notice Packets were mailed to more than twice as many Class Members as projected. *Id.* ¶ 24.

E. Payments

Chase agreed to pay “Settlement Class Consideration” of \$244,659 for: (1) payments to

the Settlement Class, (2) a Class Representative Incentive Award of up to \$5,000, and (3) Notice and Settlement Administration Costs. (Agreement §§ 2.3, 3.2, 3.3.) The funds remaining after deducting the Class Representative Incentive Award and Notice and Settlement Administration Costs from the Settlement Class Consideration (the “Net Settlement Class Consideration”) will be divided in equal shares among the Settlement Class Members who submitted a valid Claim Form. (*Id.* § 4.10(b).) Assuming a \$5,000 Class Representative Incentive Award and Notice and Settlement Administration Costs of \$59,242.46, the Net Settlement Class Consideration will be \$180,416.54, yielding a payment of approximately \$60.89 per claiming Settlement Class Member. Joint Decl. re Final Approval ¶ 13.

Within 15 days of the Effective Date,³ Chase will deposit the Settlement Class Consideration into an account which will be maintained as the “Court-approved Qualified Settlement Fund.” (Agreement §§ 3.2, 4.8.) The Settlement Administrator will mail payments to eligible Settlement Class Members within 27 days of the Effective Date. (*Id.* § 4.10(c).)

The checks mailed to Settlement Class Members Eligible for Cash Payment shall be valid for 180 days after issuance. (*Id.* § 4.10(d).) If any check is returned as undeliverable, the Settlement Administrator will make “reasonable efforts to locate the proper address for any intended recipient” and “will re-mail it once to the updated address.” (*Id.*) For checks left uncashed after the 180 days, a second distribution will be made to the Settlement Class Members who cashed their initial checks if “economically feasible.” (*Id.* § 4.10(e).) If second round distribution is not feasible, or if there are funds remaining after the “stale check date for the second distribution,” the remaining funds will then be distributed in a “mutually agreeable manner, subject to the approval of the Court.” (*Id.*) In no event shall any unclaimed funds revert

³ “Effective Date” means the date on which all of the following events have occurred: (a) the Court has entered both the Final Order and the Judgment, and (b) either: (i) the time to appeal from the Judgment or any orders entered in connection with that Judgment has expired and no appeal has been taken; or (ii) if a timely appeal of the Judgment or any orders entered in connection with that Judgment is taken, the date on which the Judgment or any orders entered in connection with that Judgment is no longer subject to further direct appellate review if the Judgment or any orders entered in connection with that Judgment have not been reversed in any way. (Agreement § 1.10.)

1 to Chase. (*Id.* § 4.10(f).)

2 **F. Post-Distribution Accounting**

3 Within 21 days after the final distribution of the Settlement funds and payment of
4 attorneys' fees, Plaintiff's counsel shall file a Post-Distribution Accounting in accordance with
5 the Procedural Guidance for Class Action Settlements and post it to the Settlement Website.
6 (Agreement § 4.12.)

7 **4. Argument**

8 **A. Legal Standard**

9 "A class action settlement must be fair, adequate, and reasonable." *Uschold v. NSMG*
10 *Shared Services, LLC*, No. CV 18-01039 JSC, 2019 WL 4963261 (N.D. Cal. Oct. 8, 2019) , at *5
11 (N.D. Cal. Oct. 8, 2019) (citing Fed. R. Civ. P. 23(e)(2)). "Where, as here, parties reach an
12 agreement before class certification, 'courts must peruse the proposed compromise to ratify both
13 the propriety of the certification and the fairness of the settlement.'" *Id.* (quoting *Staton v. Boeing*
14 *Co.*, 327 F.3d 938, 952 (9th Cir. 2003)). "If the court preliminarily certifies the class and finds the
15 settlement appropriate after 'a preliminary fairness evaluation,' then the class will be notified, and
16 a final fairness hearing scheduled to determine if the settlement is fair, adequate, and reasonable
17 pursuant to Rule 23." *Id.* (quoting *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA
18 (EMC), 2012 WL 5878390, at *5 (N.D. Cal. Nov. 21, 2012)).

19 "At the [final] fairness hearing, presently before the Court, after notice is given to putative
20 class members, the Court entertains any of their objections to (1) the treatment of the litigation as
21 a class action and/or (2) the terms of the settlement." *Ontiveros v. Zamora*, 303 F.R.D. 356, 363
22 (E.D. Cal. 2014) (citing *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir.
23 1989)). Following the final fairness hearing, the Court must reach a final determination as to
24 whether the parties should be allowed to settle the class action pursuant to their agreed upon
25 terms. *See id.*; *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal.
26 2004).

27 **B. Final Class Certification**

28 Final approval of a class action settlement requires, as a threshold, an assessment of

whether the class satisfies the requirements of Federal Rule of Civil Procedure 23(a) and (b).
Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019, 1022 (9th Cir. 1998).

(1) **Rule 23(a) Requirements**

Rule 23(a) requires that:

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In the Court's Order granting preliminary approval of the Settlement, the Court found that the putative class satisfied the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). (Dkt. No. 52 at 7-8.) There have been no developments that would alter that analysis, so the Court should find that all four of Rule 23(a)'s requirements have been met.

(2) **Rule 23(b) Requirements**

In addition to meeting the requirements of Rule 23(a), a potential class must also meet one of the conditions outlined in Rule 23(b)—of relevance here, the condition that “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). In evaluating the proposed class, “pertinent” matters include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). In its Order granting preliminary approval of the Settlement, the Court found that both prerequisites of Rule 23(b)(3) were satisfied. (Dkt. No. 52 at 8-10.) There have been no developments that would alter that analysis, so the Court should find that both of Rule

23(b)(3)'s requirements have been met.

(3) ***Rule 23(c)(2) Notice Requirements***

Finally, if the Court certifies a class under Rule 23(b)(3), it “must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). Rule 23(c)(2) governs both the form and content of a proposed notice. *See Ravens v. Iftikar*, 174 F.R.D. 651, 658 (N.D. Cal. 1997). The notice must be “reasonably certain to inform the absent members of the plaintiff class,” but Rule 23 does not require actual notice. *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994).

In its Order granting preliminary approval of the Settlement, the Court found that the content of the Notice, as revised, met the requirements of Rule 23(c)(2)(B). (Dkt. No. 52 at 14-15.) The Notice was sent to Settlement Class Members in the form approved by the Court (with placeholders filled in, typographical errors corrected, and minor formatting changes). *Compare* Chernila Decl. Exhs. D and E *with* Dkt. No. 51 at 49. Accordingly, the content of the Notice satisfies the requirements of Rule 23(c)(2)(B) for the reasons set forth in the preliminary approval Order.

The Court also previously approved the notice plan. (Dkt. No. 52 at 15.) As discussed above, KCC has fully implemented the notice plan approved by the Court, including: (1) establishing a Settlement Website containing the Notice and Claim Form, (2) emailing the Notice to all Settlement Class Members who have an email address on file with Chase, and (3) sending the Notice and Claim Form via U.S. mail to all Settlement Class Members without a current or valid email address on file and to those who did not open their email Notice within seven days. Chernila Decl. ¶¶ 8-11, 14. The Claim Form was made available on the Settlement Website and mailed along with the Notices sent by mail. *Id.* ¶¶ 9-14. Settlement Class Members were given 60 days from the date Notice was first sent on February 28, 2020 (*i.e.* until April 28, 2020) to submit a claim, request to be excluded, or file an objection. *Id.* ¶¶ 8, 17, 21-22. Further, Plaintiff’s Motion for Attorney’s fees was filed and posted to the Settlement Website on March 24, 2020—35 days before the deadline to object or opt-out of the Settlement. *Id.* ¶ 14.

Accordingly, the form of Notice satisfies the requirements of Rule 23(c)(2)(B).

C. Approval of the Settlement

A court may approve the parties' settlement only after it determines that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e). In determining whether a settlement agreement is fair, reasonable, and adequate, courts generally consider the following factors:

- (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement.

Churchill Village, L.L.C. v. General Electric, 361 F.3d 566, 575 (9th Cir. 2004). The court need not consider all of these factors, or may consider others. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ("The factors in a court's fairness assessment will naturally vary from case to case[.]").

Where, as here, "a settlement agreement is negotiated prior to formal class certification, consideration of these eight ... factors alone is" insufficient. *Id.* at 946. In such cases, courts must also ensure that the settlement did not result from collusion among the parties. *Id.* at 947. Because collusion "may not always be evident on the face of a settlement, ...[courts] must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *Id.* In *Bluetooth*, the court identified three such signs:

- (1) when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded;

- (2) when the parties negotiate a "clear sailing" arrangement providing for the payment of attorneys' fees separate and apart from class funds, which carries the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class; and

- (3) when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund.

Id. (internal quotation marks and citations omitted). As demonstrated below, the Settlement

1 satisfies both the *Churchill* and *Bluetooth* factors.

2 (1) ***The Settlement satisfies the Churchill factors.***

3 (a) *Strength of Plaintiff's Case and the Risk, Expense, Complexity, and Likely Duration of*
4 *Further Litigation*

5 Courts first consider “the strength of [Plaintiff’s] case on the merits balanced against the
6 amount offered in the settlement.” *See DIRECTV, Inc.*, 221 F.R.D. at 526 (internal quotation
7 marks and citation omitted). There is no “particular formula by which th[e] outcome must be
8 tested.” *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Rather, the court’s
9 assessment of the likelihood of success is “nothing more than an amalgam of delicate balancing,
10 gross approximations and rough justice.” *Id.* (internal quotation marks and citation omitted). “In
11 reality, parties, counsel, mediators, and district judges naturally arrive at a reasonable range for
12 settlement by considering the likelihood of a plaintiffs' or defense verdict, the potential recovery,
13 and the chances of obtaining it, discounted to a present value.” *Id.* “In most situations, unless the
14 settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and
15 expensive litigation with uncertain results.” *DIRECTV, Inc.*, 221 F.R.D. at 526 (quotation marks
16 and citation omitted).

17 Here, the Complaint alleges that Chase violated the violated ECOA’s notice provision, 15
18 U.S.C. § 1691(d), by sending class members adverse action notices that did not include the
19 specific reason(s) for the adverse action taken or disclose the right to a statement of those reasons.
20 (Dkt. No. 1-1 ¶¶ 12-17, 35.) The Complaint seeks punitive damages of up to \$500,000 (the
21 statutory cap), injunctive relief, and attorneys’ fees and costs. (*Id.* at Prayer for Relief ¶¶1-3.)
22 While Plaintiff believes his claims are meritorious and warranted imposition of the maximum
23 punitive damage award, continued litigation presents substantial risks and costs.

24 First, any punitive damages recovery likely requires a finding that Chase acted recklessly.
25 *See Anderson v. United Fin. Co.*, 666 F.2d 1274, 1278 (9th Cir. 1982) (holding that a punitive
26 damages award under § 1691e(b) requires that the creditor “wantonly, maliciously or
27 oppressively discriminates” or acts in “reckless disregard of the requirements of the law”). While
28 Plaintiff contends ECOA’s text and implementing regulations unambiguously foreclose Chase’s

1 contention that “previous unsatisfactory relationship with this bank” constitutes a specific reason,
 2 ECOA’s specificity requirement is not “black and white” and is the subject of little caselaw, so a
 3 court or jury might be reluctant to find recklessness. *See, e.g., Safeco Ins. Co. of Am. v. Burr*, 551
 4 U.S. 47, 69-70 (2007) (holding that defendant’s interpretation of the Fair Credit Reporting Act
 5 was incorrect, but not objectively unreasonable, and thus fell “well short of raising the
 6 ‘unjustifiably high risk’ of violating the statute necessary for reckless liability.”) Absent a
 7 punitive damage award, the class would not obtain a monetary recovery.

8 Second, Chase contends that whether an applicant is “aggrieved” under 15 U.S.C. §
 9 1691e(a) and whether a statement of reasons is “specific” under 15 U.S.C. § 1691(d) should be
 10 determined based on the applicant’s unique knowledge or other individualized circumstances.
 11 There is little precedent on whether an objective or subjective standard governs these inquiries
 12 under ECOA. Were Chase’s view to prevail, it could preclude Plaintiff and other class members
 13 from demonstrating statutory or Article III standing⁴ or raise individualized issues that could
 14 preclude class certification.

15 Third, litigating the case through trial would entail significant discovery and motion
 16 practice, including summary judgment and class certification motions, such that both sides’ fees
 17 and costs could exceed the \$500,000 cap on punitive damages.

18 Given the challenges Plaintiff would face should this case move forward instead of
 19 resolving, the first two factors weigh in favor of approving the Settlement.

20 (b) *Risks of Maintaining Class Action Status Throughout Trial*

21 In considering the third factor, courts look to the risk of maintaining class certification
 22 if the litigation were to proceed. Were litigation to proceed, Chase would likely argue that
 23 whether an applicant is “aggrieved” under 15 U.S.C. § 1691e(a), whether each class member has
 24 Article III standing, and whether a statement of reasons is “specific” under 15 U.S.C. § 1691(d),
 25 each present individualized questions that preclude class certification. While Plaintiff believes

26 _____
 27 ⁴ *See Ramirez v. Transunion LLC*, 951 F.3d 1008, 1017 (9th Cir. Feb. 27, 2020) (“every member
 28 of a class certified under Rule 23 must satisfy the basic requirements of Article III standing at the
 final stage of a money damages suit when class members are to be awarded individual monetary
 damage”).

1 that each of these issues present common questions, the risk a court could find otherwise supports
2 approval of the Settlement.

3 (c) *The Settlement Amount*

4 The fourth fairness factor, the amount of recovery offered, also favors final approval of
5 the Settlement Agreement. This factor “is generally considered the most important, because the
6 critical component of any settlement is the amount of relief obtained by the class.” *Bayat v. Bank*
7 *of the W.*, No. C-13-2376 EMC, 2015 WL 1744342, at *4 (N.D. Cal. Apr. 15, 2015) (citation
8 omitted). When considering the fairness and adequacy of the amount offered in settlement, “it is
9 the complete package taken as a whole, rather than the individual component parts, that must be
10 examined for overall fairness.” *DIRECTV, Inc.*, 221 F.R.D. at 527 (citation omitted). “[I]t is well-
11 settled law that a proposed settlement may be acceptable even though it amounts to only a
12 fraction of the potential recovery that might be available to the class members at trial.” *Id.*
13 (collecting cases).

14 Under 15 U.S.C. § 1691e(b), Chase’s potential liability on class members’ punitive
15 damages claims is capped at \$500,000. At preliminary approval, Plaintiff’s counsel projected Net
16 Settlement Class Consideration of \$187,659, which amounts to approximately 38% of Settlement
17 Class Members potential recovery.⁵ (Dkt. No. 52 at 13.) Due to the higher than anticipated
18 administration costs, Net Settlement Class Consideration is now projected at \$180,416.54,
19 representing approximately 36% of Settlement Class Members’ potential recovery. Joint Decl. re
20 Final Approval ¶ 13. Although less than previously estimated, the projected Net Settlement Class
21 Consideration remains fair, reasonable, and adequate in light of Chase’s maximum damages
22 exposure and the litigation risks. *See Rodriguez*, 563 F.3d at 964 (antitrust settlement providing
23 30% of estimated damages was fair and reasonable in antitrust action); *In re Anthem, Inc. Data*
24 *Breach Litig.*, 327 F.R.D. 299, 319 (N.D. Cal. 2018) (data breach settlement providing
25 approximately 14.5% of the class’s projected recovery was fair and reasonable); *see also Linney*

26
27 ⁵ Net Settlement Class Consideration was projected at \$189,557 in the Motion for Preliminary
28 Approval but projected Net Settlement Class Consideration had decreased to \$187,659 by the
time of preliminary approval because projected administration costs increased from \$50,102 to
\$52,000.

1 *v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (noting that a settlement may be
2 adequate even if it “amount[s] to a fraction of the potential recovery”).

3 Further, in addition to the monetary component, the Settlement provides for meaningful
4 injunctive relief that should put an end to the challenged conduct for at least five years and help
5 effectuate ECOA’s purposes. (Agreement § 3.5.)

6 (d) *Extent of Discovery*

7 In the context of class action settlements, as long as the parties have sufficient information
8 to make an informed decision about settlement, “formal discovery is not a necessary ticket to the
9 bargaining table.” *Linney*, 151 F.3d at 1239. Rather, the court’s focus is on whether “the parties
10 carefully investigated the claims before reaching a resolution.” *Ontiveros*, 303 F.R.D. at 371
11 (citation omitted).

12 In preparation for the July 17 mediation before Hon. Wayne D. Brazil (Ret.), Chase
13 informally produced records pertaining to its relationship with Mr. Chen and provided the size of
14 the class and the number of at-issue letters it sent during the class period. Joint Decl. re Final
15 Approval ¶ 6. This case turns primarily on the content of identical form letters, so knowing the
16 content of the letters and number of letter recipients enabled the parties to reasonably assess its
17 strengths and value. *Id.* The parties subsequently exchanged detailed mediation statements and
18 participated in a full day of mediation. *Id.* Under these circumstances, the extent of discovery
19 favors approval of the Settlement.

20 (e) *Experience and Views of Counsel*

21 The experience and views of counsel also weigh in favor of approving the Settlement.
22 Together Plaintiff’s Counsel Ray Gallo, Dominic Valerian, and Alexander Darr, have substantial
23 experience in litigating class actions and ECOA cases on behalf of consumers. (Dkt. No. 53-1 ¶¶
24 33-36.) Mr. Gallo graduated from UCLA Law School in 1991, has been litigating in consumer
25 class actions since 2004, and has been appointed as class counsel multiple times. (*Id.* ¶¶ 33-34.)
26 Mr. Valerian graduated from USC Law School in 2005, spent four years defending complex
27 cases, including consumer class actions, and since 2009, has focused primarily on prosecuting
28 consumer and employment class and mass actions, including three cases where he was appointed

co-counsel with Mr. Gallo. (*Id.* ¶ 35.) Mr. Darr graduated from Ohio State University Law School in 2010 and after clerking and working briefly at a law firm, he founded Darr Law LLC where he prosecutes consumer protection actions. (*Id.* ¶ 36.) Mr. Darr “has pursued more than 100 consumer arbitrations, many alleging claims under the Equal Credit Opportunity Act.” (*Id.*)

Based on their experience, their familiarity with the factual and legal issues in this case, the novelty of multiple legal questions in this case, the risk, delay, and uncertainty of continued litigation, the maximum potential monetary recovery, and the significant relief obtained, Plaintiff’s Counsel believe the Settlement is fair, reasonable, and adequate. Joint Decl. re Final Approval ¶ 16. Given counsel’s experience in this field, their assertion that the Settlement is fair, adequate, and reasonable supports final approval of the Settlement. *See Hanlon*, 150 F.3d at 1026; *see also DIRECTV, Inc.*, 221 F.R.D. at 528 (“Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.”) (internal quotation marks and citation omitted).

(f) *Presence of a Government Participant*

Although no government entity is a party to this action, because this action was brought under the Class Action Fairness Act, 28 U.S.C. § 1715, Chase was required to provide notice to the relevant state and federal officials under 28 U.S.C. § 1715(b). As set forth above, KCC provided notice of the revised Settlement to the relevant authorities in accordance with Section 1715(b) on January 17, 2020. Chernila Decl. ¶¶ 4-5, Exhs. B, C. Final approval of the Settlement would thus follow service of the CAFA notice by more than 90 days as required by Section 1715(d). None of the officials sent the CAFA notice have objected to the Settlement. Chernila Decl. ¶ 6.

(g) *Reaction of Settlement Class Members*

The positive reaction from Settlement Class Members weighs in favor of approval. At the time of preliminary approval, Plaintiff’s Counsel estimated a 7% claims rate based on an average claims rate of 7.37% in four similar cases involving consumer finance claims that KCC identified. (Dkt. 43 at 13.) The claims rate, however, has proven substantially higher with 2,963 valid claims, representing a robust 16.3% claims rate. *See, e.g., Messineo v. Ocwen Loan Servicing*,

1 *LLC*, No. 15-cv-02076-BLF, 2017 WL 733219, at *7 (N.D. Cal. Feb. 24, 2017) (noting that a
 2 9.26% claims rate is higher than average for consumer class settlements and favors final
 3 approval); *Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1044 (S.D. Cal. 2015) (noting that
 4 “higher than average claims rate of 7.7%” in TCPA settlement favored final approval); Federal
 5 Trade Commission Staff Report, Consumers and Class Actions (Sept. 2019) at 11 (finding
 6 median claims rate of 9% and weighted mean claims rate (*i.e.*, cases weighted by the number of
 7 notice recipients) of 4% for direct notice recipients). In addition, there have been no objections
 8 and only ten opt-outs. Chernila Decl. ¶¶ 21-22. “Courts have repeatedly recognized that the
 9 absence of a large number of objections to a proposed class action settlement raises a strong
 10 presumption that the terms of a proposed class settlement action are favorable to the class
 11 members.” *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW (EMC), 2010 WL
 12 1687832, at *14 (N.D. Cal. Apr. 22, 2010). In light of the 16.3% claims rate, the small number of
 13 opt outs, and zero objections, this factor strongly favors approval.

14 (2) ***The Settlement satisfies the Bluetooth factors.***

15 The first *Bluetooth* factor—whether class counsel receives a disproportionate distribution
 16 of the settlement, or the class receives no monetary distribution but counsel is amply rewarded—
 17 is absent or minimal here. *Bluetooth*, 654 F.3d at 947. Between the Settlement Class
 18 Consideration (\$244,659) and the maximum potential award of attorneys’ fees and costs
 19 (\$185,000), Chase has agreed to pay a total of up to \$429,659 to settle this case. The maximum
 20 potential award of attorneys’ fees and costs (\$185,000) represents 43.1% of this amount and the
 21 requested attorneys’ fees (\$176,473.93) represents 41.1% of this amount.⁶ While 41.1% exceeds
 22 the Ninth Circuit’s 25% benchmark, it is much lower than the 83.2% at issue in *Bluetooth*. *See*
 23 *Shvager v. ViaSat, Inc.*, No. 12-10180 MMM (PJWx), 2014 WL 12585790, at *13 (C.D. Cal.
 24 Mar. 10, 2014) (request for attorneys’ fees and costs amounting to 41.1% of common fund was
 25 significantly lower than the 83.2% at issue in *Bluetooth* and did not suggest collusion). Moreover,
 26 the five-year prohibition on Chase engaging in the challenged conduct constitutes a central

27 _____
 28 ⁶ Plaintiff seeks attorneys’ fees and costs of \$185,000, including fees of \$176,473.93 and costs of \$8,526.07. (Dkt. No. 53.)

1 component of the relief obtained, which cannot be easily monetized, so focusing only on
 2 monetary consideration would substantially undervalue the results achieved. *See, e.g., Bluetooth*,
 3 654 F.3d at 941 (“The ‘lodestar method’ is appropriate in class actions brought under fee-shifting
 4 statutes ... where the relief sought – and obtained – is often primarily injunctive in nature and thus
 5 not easily monetized.”); *Relente v. Viator, Inc.*, No. 12-cv-05868-JD, 2015 WL 3613713, at *3
 6 (N.D. Cal. June 9, 2015) (rejecting percentage-of-recovery method where plaintiff achieved
 7 injunctive relief halting defendant’s wrongful conduct in a consumer class action because it
 8 ignores the value of the injunction). Further, given the ECOA’s \$500,000 cap on punitive
 9 damages, attorneys’ fees will exceed the 25% benchmark in virtually every contested ECOA
 10 punitive damages class action.

11 The second sign of collusion is where the parties’ agreement contains a “clear sailing”
 12 agreement, which “is one where the party paying the fee agrees not to contest the amount to be
 13 awarded by the fee-setting court so long as the award falls beneath a negotiated ceiling.”
 14 *Schuchardt v. Law Office of Rory W. Clark*, 2016 U.S. Dist. LEXIS 6741, at *28 (N.D. Cal. Jan.
 15 20, 2016) (quoting *In re Toys R Us-Del., Inc.—Fair & Accurate Credit Transactions Act*
 16 *(FACTA) Litig.*, 295 F.R.D. 438, 458 (C.D. Cal. 2014)). The Agreement provides for Chase to pay
 17 attorneys’ fees and costs in an amount awarded by the Court of up to \$185,000. (Agreement §
 18 3.4(a).) It further provides for Chase to pay attorneys’ fees and costs “in addition to the
 19 Settlement Class Consideration” and states that “Chase has no present intention to oppose”
 20 Plaintiff’s motion for attorneys’ fees. *Id.* This is not a clear sailing provision as described above
 21 because Chase did not relinquish its right to contest a fee award of \$185,000 or less. But even if
 22 the Court finds a clear sailing provision present, there was no collusion as the attorneys’ fees
 23 Chase agreed to pay are reasonable and the Settlement is fair to the class.

24 The third *Bluetooth* factor—whether “the parties arrange for fees not awarded to revert to
 25 defendants rather than be added to the class fund” (*Bluetooth*, 654 F.3d at 948)—is present. The
 26 Settlement Class Consideration is not reversionary, but the award of attorneys’ fees and costs will
 27 be paid separately from that fund. (Agreement § 3.4(a).)

28 Notwithstanding the presence of one or more *Bluetooth* factors, the Settlement did not

1 result from collusion. The Settlement provides fair compensation to Settlement Class Members
 2 given the value of their claims and the fees and costs Plaintiff's Counsel have applied for are
 3 reasonable. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, 895
 4 F.3d 597, 611 (9th Cir. 2018) ("[f]or all these factors, considerations, 'subtle signs,' and red flags,
 5 ... the underlying question remains this: Is the settlement fair?"). Moreover, the Settlement is the
 6 outcome of arms-length negotiations conducted with the help of an experienced mediator. Joint
 7 Decl. re Final Approval ¶¶ 6-7; *Satchell v. Fed. Exp. Corp.*, No. C 03-2659 SI, 2007 WL
 8 1114010, at *4 (N.D. Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the
 9 settlement process confirms that the settlement is non-collusive."). Accordingly, the Court should
 10 find that final approval is warranted under the *Bluetooth* factors.⁷

11 **5. Conclusion**

12 For the foregoing reasons, Plaintiff respectfully requests that the Court grant final
 13 approval of the Settlement and enter Judgment.

14 DATED: May 21, 2020

RESPECTFULLY SUBMITTED,

**GALLO LLP
 DARR LAW LLC
 VALERIAN LAW, P.C.**

18 By: /s/ Dominic Valerian
 19 Dominic Valerian
 20 Attorneys for Plaintiff

21
 22
 23 ⁷ See, e.g., *Bluetooth*, 654 F.3d at 950 (noting that the district court may find the settlement
 24 reasonable notwithstanding the presence of all three *Bluetooth* factors); *Dashnaw v. New Balance*
 25 *Athletics, Inc.*, No. 17cv159-L(JLB) 2019 WL 3413444, at *6 (S.D. Cal. Jul. 29, 2019) (granting
 26 final approval of consumer class action settlement where defendant agreed to pay up to \$650,000
 27 in attorneys' fees and costs on a \$1.4 million settlement and three *Bluetooth* factors applied);
 28 *Shvager*, 2014 WL 12585790, at *13 (granting final approval of consumer class action settlement
 where defendant agreed to pay up to \$150,000 in attorneys' fees and costs on a \$365,000
 settlement and two *Bluetooth* factors applied); *Schuchardt v. Law Office of Rory W. Clark*, 314
 F.R.D. 673, 687 (N.D. Cal. 2016) (granting final approval of consumer class action settlement
 where two *Bluetooth* factors applied because the it adequately satisfied class members' claims).